

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY-FIVE

Owensboro, KY

EXTENDICARE HOMES, INC., d/b/a  
BON HARBOR NURSING AND  
REHABILITATION CENTER  
Employer

and

Case 25-RC-10304

UNITED STEELWORKERS – USW  
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held October 5, 2005, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.<sup>1</sup>

I. ISSUES

United Steelworkers of America, AFL-CIO, CLC, (the "Petitioner") seeks an election within a unit which includes, *inter alia*, all licensed practical nurses ("LPNs") employed as by Extendicare Homes, Inc., d/b/a Bon Harbor Nursing and Rehabilitation Center (the "Employer")

Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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at its Owensboro, Kentucky, facility. The Employer, however, contends that the LPNs should not be included in the unit because they are supervisory employees within the meaning of Section 2(11) of the Act. There are approximately 23 LPNs employed at the facility.<sup>2</sup> The parties have otherwise agreed upon the composition of the appropriate bargaining unit, and the status of LPNs is the only issue in dispute.

## II. DECISION

Based upon the evidence produced at the hearing showing that LPNs now responsibly direct, discipline, and effectively recommend such actions with the requisite degree of independent judgment, it is concluded that the Employer's LPNs are supervisors within the meaning of Section 2(11) of the Act and therefore they are excluded from the appropriate unit for purposes of collective bargaining. This decision is based upon evidence that the Employer has changed its operations, including the job duties and responsibilities of LPNs, at the facility in the time since a prior hearing in Case 25-RC-10230 was held on this same issue on March 30, 2004. In that earlier case, it was decided that LPNs were not supervisors within the meaning of Section 2(11) of the Act. In the instant case, the Employer has provided sufficient evidence to demonstrate that LPNs at the facility are now supervisors within the meaning of Section 2(11) of the Act.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified medication assistants, certified nursing assistants, dietary, activities, and maintenance employees employed by the Employer at its Owensboro, Kentucky, facility; BUT EXCLUDING all licensed practical nurses, registered nurses, housekeeping and laundry employees, office clerical employees, managerial employees and all guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 71 employees for whom no history of collective bargaining exists.<sup>3</sup>

The LPNs are also referred to as "LPN charge nurses" by the Employer; however, herein they are designated as LPNs.

2        The unit consists of 47 CNAs and 6 CMAs in the Nursing Department, 14 employees in the dietary department, 2 employees in the activities department and 2 employees in the maintenance department.

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### III. STATEMENT OF FACTS<sup>4</sup>

#### A. Overview of Operations

The Employer operates a long-term care facility licensed by the Commonwealth of Kentucky. The facility has a total of 132 beds and is divided into four units, skilled, west, south and north. The skilled unit has 44 beds. The west unit has 28 beds, while the south and north units each house 30 beds. The Employer's operations are divided into several departments: dietary, social services, housekeeping, maintenance, therapy, activities, business, human resources, admissions, and nursing. Each of these departments is managed by a department head who reports to the Administrator. The department heads and the Administrator work Monday through Friday from 8:00 a.m. to 5:00 p.m.

#### B. Nursing Department

The Nursing Department is primarily responsible for providing direct patient care. The Nursing Department is managed by the Director of Nursing ("DON").<sup>5</sup> The DON works Monday through Friday from 8:00 a.m. to 5:00 p.m. and reports directly to the Administrator. Under the Director of Nursing is the Assistant Director of Nursing ("ADON") who also works from 8:00 a.m. to 5:00 p.m. The ADON reports directly to the DON and is also responsible for supervising nurses in all four units<sup>6</sup>. At the time of the prior hearing in March 2004, the Employer also employed two Unit Managers who were responsible for the oversight of the four units, including the responsibility for directing patient care as well as personnel issues. Since that time, however, the Employer has eliminated this position at the facility and the ADON now fulfills those responsibilities. The Employer's two MDS Coordinators are members of the Nursing Department and report directly to the Administrator. The MDS Coordinators are responsible for planning and assessing the care of patients and ensuring that the proper paperwork is prepared under state and federal laws for Medicare and Medicaid.<sup>7</sup> In addition the

4 The record of the hearing held in Case 25-RC-10230 held on March 30, 2004 was entered into evidence at the hearing in the instant case. The evidence presented in that case, as well as evidence presented in the instant case, forms the basis of this decision.

5 At the hearing the parties entered into a stipulation that the DON is a supervisor within the meaning of Section 2(11) of the Act since she possesses and exercises one or more of the powers enumerated in Section 2(11).

6 At the hearing the parties entered into a stipulation that the ADON is a supervisor within the meaning of Section 2(11) of the Act since she possesses and exercises one or more of the powers enumerated in Section 2(11).

7 At the hearing in Case 25-RC-10230, the parties agreed to exclude the MDS Coordinators from the unit on grounds that they lack of a community of interest with members of the bargaining unit.

Employer also employs a Weekend Supervisor, who is a Registered Nurse (“RN”).<sup>8</sup> This individual works from 7:00 a.m. until 7:00 p.m. on Saturdays and Sundays and reports directly to the DON.

At the time of the March 2004 hearing, the responsibilities of hiring, staffing, and scheduling in the Nursing Department was held by a Staffing Development Coordinator. However, since the March 2004 hearing, the Employer has modified the position and now employs a Scheduling Coordinator who holds the responsibility for the scheduling of all employees in the Nursing Department.<sup>9</sup> This position is currently filled by an individual who was previously a certified nursing assistant (“CNA”). In addition the Employer now has a Human Resources Manager who is responsible for discharges in the Nursing Department, payroll issues, and the recruitment and hiring of CNAs and certified medication assistants (“CMA”). The recruitment and hiring of RNs and LPNs is handled primarily by the DON and ADON although the Human Resources Manager might also do some preliminary screening of applicants for those positions as well. The Nursing department also includes three RN Charge Nurses, who, as mentioned above, the parties have stipulated should not be included in the unit since they are statutory supervisors.

The remainder of the Nursing Department consists of the 23 LPNs, approximately 47 CNAs, and 6 CMAs. These employees work one of three shifts, which are from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. These shift times apply seven days a week. The number and classification of employees assigned to each unit vary by unit and shift. On the first shift in the skilled unit, there are two LPNs, four CNAs, and one CMA. On second shift in that unit there are two LPNs and four CNAs, while third shift is staffed with one LPN and two CNAs in the skilled unit. One LPN and three CNAs staff the west unit during the first shift, while one LPN and two CNAs staff that unit on second shift. On the third shift the west unit has one LPN, who is shared with the south unit, and one CNA. The first shift of the north unit is staffed by one LPN, three CNAs, and one CMA. The second shift on north Unit is one LPN and two CNAs, and the third shift has one LPN, who is shared with the south unit, and one CNA. The first shift on the south unit has one LPN and three CNAs. The second shift has one LPN and two CNAs, and the third shift has one LPN, shared with the north unit, and one CNA. This shift assignment provides for a general ratio one LPN to two CNA/CMAs.

The Employer pays LPNs at the facility a base wage of \$14.00 per hour with a 15 cent per hour increment added for each year of experience. The average wage for an LPN at the facility is \$16.00 per hour. CNAs are paid a base wage rate of \$7.50 per hour with a 10 cent per hour increment added for each year of experience<sup>10</sup>. The average CNA wage rate at the facility

<sup>8</sup> At the hearing, the parties stipulated that RNs, including the weekend supervisor, are supervisors within the meaning of Section 2(11) of the Act since they possess and exercise one or more of the powers enumerated in Section 2(11).

<sup>9</sup> The parties stipulated that the Scheduling Coordinator should not be included in the unit since she is a supervisor within the meaning of Section 2(11) of the Act.

<sup>10</sup> The record does not indicate the wage rate of the CMAs.

is \$8.37 an hour. LPNs receive a signing bonus of \$2,000 while CNAs receive a signing bonus of \$1,000. LPNs also accumulate benefits at a higher rate than CNAs and are eligible for better insurance coverage than either CNAs. The record does not indicate whether members of the Nursing Department who are stipulated supervisors earn a salary or hourly wage.

### C. Job Duties of the LPNs

The Employer's job description for LPNs designates the position as "LPN Supervisor." The description states:

Under the supervision of the RN Care Manager/DON, a Licensed Practical Nurse/LVN performs as a licensed care giver and assumes responsibility and accountability for assigned residents/patients for a shift of duty. Nursing care is provided through coordination, implementation, and evaluation of the resident's/patient's plan of care. The LPN/LVN adheres to the standards of care for the area, manages the environment to maintain resident/patient safety, and supervises the resident/patient care activity performance by nursing assistants...

The job description goes on to set forth the "Essential Functions" of the position. Among these "Essential Functions" are "Supervisory Responsibilities" including the following: make daily work assignments; direct the work of employees; schedule lunch and rest breaks; authorize early departures and overtime; reassign employees; prepare written evaluations of employees; enforce facility policies with authority to issue disciplinary action reports, authority to suspend employees for infractions; initial time records; and receive and handle employee complaints.

During new employee orientation, the Human Resources Manager follows a checklist of general orientation information which was revised in October 2004. In addition, when meeting with a new LPN, the Human Resources Manager is instructed to inform them that: CNAs and CMAs will report directly to the LPNs; the LPNs are expected to resolve the grievances of CNAs and CMAs when feasible; the LPNs set the break and lunch times for their CNAs and CMAs; LPNs are responsible for making job assignments to CNAs and CMAs; LPNs are responsible for monitoring the work of CNAs and CMAs; LPNs prepare 90 day and annual evaluations for CNAs and CMAs; and for determining discipline for infractions by CNAs and CMAs. LPNs also attend a meeting approximately once a month held by the DON and ADON to discuss workrelated issues including the performance of CNAs and CMAs in their area and the oversight of those employees by the LPNs. CNAs and CMAs do not attend these meetings.

At orientation for new CNAs and CMAs, the Human Resources Manager reviews the CNA guidelines which have been implemented since March 2004. These guidelines indicate that the LPN in their area is responsible for assigning breaks and lunch times to CNAs and CMAs, making daily work assignments for CNAs and CMAs and handling any problems that might arise in the course of those assignments, giving them their performance evaluations, and authorizing them to leave work early.

The Employer asserts that based on the above job duties, including assignment and responsible direction of work, discipline, setting working hours, performing evaluations, and

resolving grievances, LPNs are supervisors within the meaning of Section 2(11) of the Act. The Petitioner contends that there is insufficient evidence of supervisory status on the part of LPNs and that they should be included in the unit. A closer review of each of the indicia of supervisory status asserted by the Employer shows that based on the evidence presented at this hearing and the change in LPN job duties since the hearing held in Case 25-RC-10230, LPNs at the Employer's facility are now supervisors within the meaning of Section 2(11) of the Act and must, therefore, be excluded from the appropriate unit in this case.

1. Assignment and Responsible Direction of Work

The daily work schedule for each LPN, CNA and CMA is prepared by the Scheduling Coordinator. The Coordinator assigns each LPN, CNA and CMA to a specific shift, a specific unit, and to work specific days of the week. Due to a high rate of staff turnover and absenteeism, it is often necessary to secure replacements for absent CNAs and LPNs are assigned that task. LPNs may be notified of prospective absences on succeeding shifts, or absences on their own shifts. In an attempt to locate a substitute, LPNs may call a CNA who is not scheduled to work that shift; may ask a CNA who is about to complete a shift to extend her work hours into the next shift; may request the transfer of a CNA from another unit; or may work with fewer CNAs than originally scheduled. The LPN may also contact a temporary employment agency to obtain a replacement CNA. The decision on which of the above options to use is left up to the discretion of the LPN. When contacting off-shift CNAs, the LPNs may contact whomever they wish even if using a specific CNA would result in overtime pay. Even though it is not necessary for the LPN to obtain permission from a higher authority in order to request a CNA to work beyond the normal end of her shift, the LPNs cannot compel employees to work overtime. It is also possible that the shift will have to work short if a replacement cannot be found.

Each LPN receives a "shift report" from the LPNs of the preceding shift noting any changes in patients' conditions or any other unusual events which occurred during the previous shift. After the LPNs have addressed any staffing shortage, they discuss any changes in residents' conditions with the off-going nurse(s). The LPNs then discuss this information with the CNA/CMAs on their shift. The LPNs also alert the CNAs if a particular resident has an appointment scheduled on the unit's calendar for that day in order to enable the CNA to ensure that the resident is dressed, fed and ready at the appointed time for departure. Nursing assignment sheets designate a specific CNA to the care of a designated group of residents. The nursing assignment sheets are completed by the LPNs. The assignment sheets contain information such as the days designated for a resident's bath/shower; whether the resident is able to use the dining service or needs assistance eating; whether the resident is ambulatory or needs assistance, and whether one or two people are required to lift the patient. The assignment sheets also contain non-patient care assignments for the CNAs such as cleaning the utility room or lounge. The LPNs may on their own authority change these resident assignments for CNAs, possibly increasing the workload for one CNA while lightening the work load of another. The LPNs make these assignment based on the skills and abilities of each CNA. Some LPNs have their CNAs work together as a team, and others have them work separately.

During the shift, LPNs make rounds of the residents. The LPNs dispense medications and provide therapeutic treatments for residents, such as flushing G tubes and handling IVs. While making their rounds the LPNs also monitor the work of the CNAs. They may verbally instruct CNAs to perform some task correctly, or to perform certain functions as needed. During the shift the LPNs also assign break and meal periods for the CNAs. CNA/CMA's must report to the LPN before going on break or lunch. The LPN's decision on when to allow a break or lunch is based on patient care needs and whether in the LPN's opinion, the CNA has completed necessary tasks. The LPN can also shorten a CNA's break or lunch time if the LPN decides the CNA is needed on the floor. LPNs can also on their own discretion authorize a CNA to leave work before the end of the shift. The LPN then decides whether another CNA needs to be found to cover for the CNA who left or whether the work can be done by employees at the facility. If the LPN decides another CNA is needed, the LPN may follow any of the procedures described above to locate another CNA.

## 2. Discipline

The Employer's Employee Handbook contains a list of work rule violations, which are classified into three categories dependent upon the severity of the offense. Discipline appropriate for repeated violations of the same class of offenses is also indicated. According to the DON, the disciplinary procedure is progressive and employees receive various levels of discipline automatically depending upon previous discipline and the severity of the rule violation. Rule infractions are recorded on Disciplinary Action Report forms. These forms are located at each nurses' station. If an LPN observes behavior on the part of a CNA or CMA which she regards as a violation of company rules, the LPN can discipline the employee. The form this discipline takes is left to the discretion of the LPN. For a gross infraction that affects resident care, the LPN can direct the CNA to leave the facility.<sup>11</sup> For lesser infractions the LPN can give the CNA a verbal warning, conduct an "in-service" training, or complete a Disciplinary Action Report. The choice of action is up to the discretion of the LPN.

If the LPN determines that written discipline is warranted, a description of the alleged misconduct and the work rule which was allegedly violated is written on the form. The LPN gives the offending employee an opportunity to read the document and to write her/his version of events on the document. The Disciplinary Action report is then placed in the offending employee's personnel file. At the time of the March 2004 hearing, these forms were forwarded to the appropriate Unit Manager and/or DON for action. The form contains a place to record any prior disciplinary action in the employee's file. LPNs now have access to employee personnel files if they wish to review prior discipline. In addition, the form contains a space to describe the disciplinary action: i.e. first notice, second notice, final notice, discharge warning or discharge from employment. Fourteen Disciplinary Action Reports signed by LPNs with dates ranging

<sup>11</sup> The record shows two instances in the past year where an LPN sent a CNA home for a rules infraction. One involved a CNA being aggressive towards another CNA, and the other occurred after the LPN was unable to find the CNA for over two hours. In both instances the LPN took the action on her own authority.

from July 2004 to September 2005 were entered into evidence. In the area where the LPN is to indicate the disciplinary action taken, six of the reports do not indicate any level of discipline, four indicate that they are final notices, and four indicate that they are first notices. The report also states that any further rules violations by the employee will result in additional discipline up to and including discharge.

### 3. Evaluations, Rewards and Adjustment of Grievances

CNAs receive performance evaluations on a yearly basis. These performance evaluations are completed by an LPN. The evaluations consist of ten areas which are scored on a numeric system, along with a place for narratives of strengths and areas of improvement. The LPN assigns scores to the ten areas which are then totaled to provide a final score. The LPN completes the evaluation and assigns a numeric score to each of the ten categories without consulting any other management official. Once the evaluation is completed, the LPN issues it to the CNA to review. The CNA is allowed to discuss the evaluation with the LPN. Both the LPN and the CNA then sign the evaluation, and it is placed in the CNA's personnel file. The Employer method of assigning wage increases to employees has varied. All wage increases are granted in March. Two years ago the Employer based the size of the wage increase on the specific score given to each employee on their evaluation. Last year all employees who had a satisfactory rating were given a 3% wage increase.

The Employee Handbook contains an employee complaint procedure which provides that if employees have a concern or problem, they should discuss it with their "immediate supervisor". CNAs and CMAs are directed during orientation to discuss any work related problems with their LPN, and LPNs are directed during orientation and subsequent meetings to resolve these problems themselves whenever feasible. The record contains little specifics of LPNs adjusting grievances or playing a role in the resolution of employee complaints. An LPN who testified at the hearing stated that she handles such complaints on a weekly basis. CNAs complain to her about job assignments, workloads, and co-workers. The LPN also testified that she always tries to resolve these problems herself, when possible, by such methods as adjusting work assignments.

## IV. DISCUSSION

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any 1 of the 12 enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861 (May 29, 2001), Sl. Op. at 5. The twelve powers set forth in Section 2(11) of the Act in defining a supervisor are the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action."



The burden of proof rests upon the party alleging that an individual is a supervisor. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisor authority. Sears Roebuck & Co., 304 NLRB 193 (1991).

Since the Employer is the party asserting the supervisory status of the LPNs in the present case, the Employer has the burden of proof. The Employer has not asserted, nor has it provided any evidence that the LPNs possess the authority to hire, transfer, suspend, lay off, recall, promote, or discharge employees, or effectively recommend such actions. The Employer, however, does contend that the LPNs can assign, reward, and discipline employees, responsibly direct employees, adjust employee grievances, or effectively recommend such actions. The Employer has met its burden of proof on the issues of assignment, responsible direction, and disciplining employees. Thus, it is determined that based on changes made by the Employer concerning the job duties and authority of the LPNs, the LPNs are now supervisors within the meaning of Section 2(11) of the Act.<sup>12</sup>

A. Assignment and Direction of Work

Based on the evidence presented at the hearing in this matter, the assignment of work by LPNs to CNAs and CMAs does involve independent judgment by the LPNs and, therefore, confers supervisory authority on the LPNs. The first example of this is in the LPNs scheduling of CNA and CMA break and lunch times. It was established in the record that an LPN has absolute discretion as to when to allow a CNA or CMA under her to take a break or lunch. When the CNA or CMA is ready to take a break, he or she must go to the LPN and request permission to take the break. The LPN then makes a decision based on the work requirement at that time as to whether to allow the break. LPNs also have the authority, and the record indicates that they do exercise such authority, to cut a CNA or CMA's break short if a situation arises on the floor requiring immediate attention. Based on the above, the LPNs assignment of break and lunch times does involve independent judgment unlike the situations in Providence Hospital, 320 NLRB 717, 732 (1999) and Health Resources of Lakeview, 332 NLRB 878 (2000). In both of those cases, the Board emphasized that the determination as to when an employee would take a break did not take any independent judgment but rather was of a routine nature. In the instant case, the record shows genuine independent judgment in the assignment of breaks and lunches by LPNs. When one CNA complained to management about her LPN's method of assigning

<sup>12</sup> The Employer has not met its burden regarding the LPNs ability to reward employees or adjust their grievances, but since only one indicia of supervisory authority is necessary to require a finding of supervisory status, this failure regarding rewards and adjustment of grievances does not impact this decision.

break and lunch times, she was told that it was completely within the LPN's discretion as to whether the CNA even got a lunch or break time.

The Employer has also established that LPNs use independent judgment in their assignment of work to CNAs and CMAs, as well as the LPNs' direction of that work. LPNs complete the nursing assignment sheet for the CNAs and CMAs in their area. Thus, it is the LPN who determines to which patients a CNA or CMA will be assigned. Those assignments may then be changed at any time by the LPN as situations arise during the course of a shift. Evidence was presented demonstrating that LPNs have a wide degree of discretion in how the assignments of work are made. One LPN testified that she generally worked with two CNAs and had two different areas to cover. She assigned the tasks to the CNAs together as a team rather than splitting the CNAs to each work a separate area. The decision to assign work in this manner was the LPN's, and if she chose in the future, the LPN could split the two CNAs and assign them to separate areas. Based on this control of a CNAs work assignments, LPNs exercise independent judgment in assigning work to CNAs and CMAs. Alter Barge Lines, 336 NLRB 1266 (2001).

It is not disputed that LPNs monitor the work performed by the CNAs and CMAs to ensure that their tasks are being performed in a proper manner. Upon occasion an LPN may correct the manner in which a CNA or CMA is performing a task. This may involve conducting an "in-service" whereby the LPN explains or demonstrates the correct way to perform a task or could result in the LPN issuing some form of discipline to the CNA or CMA. These "inservices" appear to be informal in nature. The LPN completes an "in-service" training record which describes the correct way to perform a task, and requests the CNAs and CMAs to sign the form indicating that they have read the form and/or have been so instructed. LPNs are also evaluated on how they perform their supervision of CNAs and CMAs. The evaluations of LPN are completed by the DON or the ADON. The Employer entered ten LPN performance evaluations into evidence. All ten of these evaluations contained comments on the LPNs strengths and weaknesses as a supervisor. Several of the evaluations contained comments that the LPN needed to improve her delegation of tasks to CNAs. Based on the LPNs ability to direct the work of the CNAs and CMAs and the LPNs ability to back up said direction with discipline if necessary, and the LPNs being held responsible by the DON and ADON for that direction, the Employer has presented sufficient evidence for a finding that the LPNs do responsibly direct CNAs and CMAs.

However, the LPNs' authority to call-in replacements for absent CNAs does not confer supervisory status. The record demonstrates that LPNs have no authority to add to the staffing levels established by the Scheduling Coordinator. The LPNs' authority only extends to trying to secure replacements for absent employees. In procuring replacements the LPNs may only solicit volunteers; they have no authority to compel an employee to come into work or to work overtime. If the LPN is unsuccessful in securing a volunteer, the unit works short handed. The Employer asserts that the LPNs can contact a temporary employment agency to obtain another employee, but the record contains no evidence of this ever occurring. Calling in employees or randomly selecting volunteers, without the ability to compel an employee to come to work or work overtime, does not confer supervisory status upon the LPNs. Beverly Enterprises v. NLRB, 148 F. 3d 1042, 1047 (8<sup>th</sup> Cir. 1998), enfg. Beverly Enterprises-Minnesota, Inc.,

323 NLRB No. 200 (2000); Harborside Healthcare, Inc., 330 NLRB 1334, 1336 (2000).

Based upon the above, the Employer has met its burden of establishing that LPNs assign and responsibly direct the work of CNA/CMAs using independent judgment in a manner conferring supervisory status.

B. Discipline

The record reveals that LPNs do have the authority to discipline CNAs and CMAs in a variety of ways. An LPN can verbally warn a CNA or a CMA for a violation, or the LPN can give the employee what is referred to as an “in-service” where the LPN demonstrates the correct manner to perform a task under Employer guidelines. LPNs can also give the CNA or the CMA a Disciplinary Action Report that is placed in the employee’s file. Finally, for a blatant violation, the LPN can send the employee home. The decision as to which type of discipline to issue, or whether to issue any discipline at all, is left to the discretion of the LPN. In that respect this case is similar to a recent Board decision in Wilshire at Lakewood, 345 NLRB No. 80 (September 30, 2005). In that case the board found that a registered nurse was a supervisor based on her ability to discipline employees. If the nurse saw an employee commit an infraction, then the nurse could issue a disciplinary write-up to the employee. The nurse could also choose to overlook the infraction and not issue a write-up to the employee. The Board held that this discretion on the part of the nurse evidenced the use of independent judgment in exercising her decision to issue the write-up to the employee. The evidence was unclear as to what the ramifications to the employee were for having a disciplinary write-up issued, but the Board said that the write-up initiated the employer’s disciplinary process and was therefore discipline.

Under the Board’s rationale in Wilshire at Lakewood, the LPNs in the instant case are supervisors within the meaning of Section 2(11) of the Act. The LPNs can issue a Disciplinary Action Report to an employee, and the Disciplinary Action Report is clearly part of the Employer’s progressive discipline process. A majority of the Disciplinary Action Reports entered into evidence at the hearing in this matter were marked either first or last warning. The reports are made a part of the offending employee’s personnel file. Therefore, based on Wilshire at Lakewood, such actions constitute discipline as used in Section 2(11) of the Act. Further, based on the rationale of the same case, since LPNs in the instant case have the discretion to issue Disciplinary Action Reports or not issue such a report for an infraction, or to issue some other form of discipline such as a verbal warning, the LPNs exercise independent judgment in determining the discipline. Therefore, the LPNs in this case are supervisors within the meaning of Section 2(11) of the Act.

There was also record evidence that LPNs have the authority to send an employee home for a violation of the Employer’s rules. The two specific incidents entered into evidence both occurred in the last year. In one, a CNA was sent home by an LPN after she behaved aggressively towards another CNA. The other situation involved a CNA who was sent home after an LPN was unable to locate her for over two hours. However, the ability to send an employee home for a serious rule violation is not indicative of supervisory status because it does not require the use of independent judgment. Michigan Masonic Home, 332 NLRB 1409, 1411, fn. 5 (2000).

Accordingly, the evidence concerning the authority of LPNs to discipline employees, exercising independent judgment, by issuing disciplinary action reports is sufficient to establish that they are supervisors within the meaning of the Act.

C. Performance Evaluations, Rewards and Adjustment of Grievances

The Employer also contends that the LPNs' evaluations of CNAs are an indicia of supervisory status. The enumeration of supervisory powers in Section 2(11) does not include "evaluate." It is only when evaluations affect the wages or employment status of employees that the individual performing the evaluations will be found to be a supervisor. Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB 826 (July 2002); Harborside Healthcare, Inc. 330 NLRB 1334 (2000). In the instant case the evidence offered by the Employer of a link between evaluations and wage increases is too tenuous to support a finding that completing the evaluations confers supervisory status on LPNs. According to the evidence offered at the hearing, two years ago the Employer used a formula that included an employee's evaluation score in determining the size wage increase an employee would receive. Last year, the Employer gave the same size increase to every employee who received a satisfactory rating. The Employer was unable to say on what criteria it intends to base future wage increases. Since the relationship between evaluation score and wage increase is so murky, an LPN would have no knowledge of the impact any particular score may have upon a CNA's income. Thus, if an LPN wished to either economically reward or punish an employee, s/he would not know what score would accomplish the feat. The evidence indicates instead that the performance evaluations are reportorial in nature, and do not evidence supervisory authority. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The Employer asserts that LPNs possess the authority to adjust employee grievances. The Employee Handbook contains an employee complaint procedure which provides that if employees have a concern or problem, they should discuss it with their "immediate supervisor." CNAs and CMAs are made aware that the LPN is their immediate supervisor and that work issues should first be taken up with the LPN. One LPN testified that she received complaints from CNAs and CMAs on a weekly basis concerning such issues as assignments and co-workers and that the LPN tried to address these complaints. The record, however, is devoid of any evidence of what specific action an LPN could take to adjust a grievance. Even if the LPNs have the authority to resolve minor disputes such as co-worker personality problems, this would be insufficient to establish supervisory status. Ken Crest Services, 335 NLRB 777, 779 (2001).

There are also secondary indicia both of supervisory status and non-supervisory status on the part of LPNs. The average LPN at the Employer's facility makes over twice what the average CNA

D. Secondary Indicia

makes. In addition the LPN accumulates benefits points at an increased rate when compared to a CNA, and the LPN is eligible for a preferred insurance plan not made available to CNAs. LPNs are the highest ranking individuals at the facility during the overnight hours. However, the fact that a determination that LPNs are supervisors within the meaning of Section 2(11) of the Act provides the Employer with a 2 to 1 supervisory ratio, militates against such a

finding. In sum, these indicia are insufficient to confer supervisory status standing on their own. However, when considered in conjunction with the instances of supervisory authority described above, the bulk of the secondary indicia, provide additional evidence of the LPNs supervisory status. Wilshire at Lakewood, 345 NLRB No. 80 (September 30, 2005).

#### E. Conclusion

Based upon the evidence and changes to the LPNs' job duties and authority described above, it is concluded that the Licensed Practical Nurses employed by the Employer are supervisors within the meaning of Section 2(11) of the Act. Accordingly, Licensed Practical Nurses shall not be included in the unit found appropriate herein.

#### V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO, CLC.

#### VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. Club Demonstration Services, 317 NLRB

349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, **on or before November 3, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 10, 2005.

SIGNED at Indianapolis, Indiana, this 27<sup>th</sup> day of October, 2005. /s/

Rik Lineback  
Regional Director  
National Labor Relations Board  
Region Twenty-five  
Room 238, Minton-Capehart Building  
575 North Pennsylvania Street  
Indianapolis, Indiana 46204-1577

RL/mtb/jcm  
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